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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,
Appellants

v.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,
Appellees

On Appeal From the United States District Court For the Southern District of Texas, Houston Division

MOTION TO AFFIRM

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September, 1978

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Appellees

On Appeal From the United States District Court For the Southern District of Texas, Houston Division

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MOTION TO AFFIRM

Appellee in the above entitled cause moves the court to affirm the decree below in the above entitled cause and to dismiss the appeal therefrom, for the following reasons to wit:

I

That this civil action was filed to challenge the constitutionality of Title Two (2) sections 34.05(c), 34.06, 34.08, 11.10, 11.15, 17.02, 17.03, 17.05 and 17.06 of the Texas Family Code (1974).

II

Appellees alleged that they had been deprived of rights, privileges, liberties and immunities secured to them by the Constitution of the United States while acting under color of such State statutes and by the use of standards and procedures which are violative of Article I, Section 9 of the United States Constitution and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States.

III

Appellees sought a declaratory judgment declaring certain statutes of the State of Texas contained in Title 2, Texas Family Code repugnant to the Constitution of the United States, null and void on their face, and also as applied to Appellees. Appellees further requested the Court to permanently restrain and enjoin operation, enforcement and implementation of such State statutes and rules, regulations and policies made pursuant and incident thereto.

IV

JURISDICTION

Jurisdiction was invoked pursuant to the provisions of 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 2201, 2281, 2284; and the following provisions of the United States Constitution: Article I, Section 9 and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments.

V

STATEMENT

Appellees are a family—father, mother and three minor children—one natural born, two adopted, ages nine, eight and seven.

VI

In March, 1976, the Sims children lived with their parents in Montgomery County, Texas, and attended the John G. Osborne Elementary School in the Houston Independent School District, located in Harris County, Texas.

VII

On March 25, 1976, the Harris County Child Welfare Unit received a telephone report from the school that Paul Sims was possibly the victim of child abuse. On that same day, Rex Downing, a case worker employed by Harris County Child Welfare, acting without a court order, summarily seized the three minor Appellees.

VIII

A forty-two (42) day separation of the family unit ensued from the time of the seizure of the three minor Appellees on March 25, 1976 to May 5, 1976. The Federal District Court ordered the children returned to their parents on May 5, 1976. Appellees were not afforded a hearing, nor was process served or notice of a hearing issued at any time during the forty-two (42) day period.

IX

That the following is a chronology of events that transpired:

From and after seizure of the three minor Appellees on March 25, 1976, a 42-day separation of the family unit ensued, ending on May 5, 1976, when this Honorable Court ordered return of their children to the adult Appellees. During the forty-two (42) days, no process or notice of hearing issued, nor were Appellees afforded a hearing.

The following chronology of events occurred:

(1) On March 25, 1976, adult and minor appellees maintained a residence located at Route 3, Box 1304, Conroe, Montgomery County, Texas.

(2) On March 25, 1976, the three minor Appellees were enrolled in and regularly attending classes at John G. Osborne Elementary School in Houston, Harris County, Texas, for which adult Appellees paid a monthly tuition charge to the Houston Independent School District.

(3) Minor Appellee Sabrina Marie Sims, the only natural child of adult Appellees, was born to them August 16, 1967, and is now age nine years.

Minor Appellee Paul Edward Sims was born December 10, 1967, is now age eight years, and was adopted by adult Appellees through Harris County Child Welfare Unit (hereafter referred to as Child Welfare) pursuant to Decree of Adoption granted July 18, 1974, by Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas (hereafter referred to as Juvenile Court).

Minor Appellee Shawana Evette Sims was born March 2, 1969, is now age seven years, and was adopted by

adult Appellee through Child Welfare pursuant to Decree of Adoption granted by Judge Lowry on August 12, 1975.

(4) On March 25, 1976, in response to a telephone report of child abuse made by personnel of John G. Osborne Elementary School regarding only the minor Appellee Paul Edward Sims, Child Welfare's agent and employee Caseworker Rex Downing went to the school.

Mr. Downing took possession and control of not just Paul Edward Sims, regarding whom the report of child abuse had been made, but the two other Sims children as well, and did so shortly after 1:30 P.M. on that day, caused all three to be transported to the Child Welfare Clinic at 4040 Milam, Houston, Texas, where all three were examined by Dr. Marie L. Surgi over the express objection of adult Appellees.

(5) No writ of a magistrate was obtained by Downing prior to his taking possession and control of the three minor Appellees; and the only notice given to adult Appellees of the seizure of their children was by telephone calls to them on their jobs by the school principal.

(6) When Caseworker Downing went to the school on March 25, 1976, to make investigation he interviewed the minor Appellee Paul Sims who had been the subject of the telephone report of abuse for two to three minutes. Neither of the parents was interviewed prior to his taking possession and control of their three children.

(7) The minor Appellees were not delivered to any court on the date of their seizure, shortly after 1:30 P.M., March 25, 1976.

(8) The following day, March 26, 1976, at 4:54 P.M. Betsy C. Conner (a court representative who is not an

attorney) filed a Suit For Protection Of Child In Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code which was docketed under Cause No. 38,295 in the Juvenile Court Number One of Harris County, Texas, and in which all three minor Appellees were made subjects of suit.

(9) No names or places of residence of the parents or persons responsible for the care of the three minors appeared at any place in the petition although the Petitioner therein requested "that citation and notice be issued to all persons named."

(10) Only six minutes after time of filing of such suit and at 5:00 P.M. on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court entered an Ex Parte Order by the terms of which Gene Lege, Director of Harris County Child Welfare was made temporary managing conservator of the three minor Appellees.

On its face such Ex Parte Order recites that the matter was presented to the Court in chambers, without notice to or hearing afforded the adult Appellees.

(11) On March 31, 1976, counsel for the adult Appellees filed a Motion To Modify Temporary Orders For Emergency Protection Of Child with attached proposed Order Modifying Temporary Orders. Both instruments were stamped "Received" and "JUV" by the Clerk of the Juvenile Court but were returned to counsel by the Clerk who had been instructed not to set a hearing.

(12) On March 31, 1976, counsel for adult Appellees also filed a Petition For Writ Of Habeas Corpus seeking return of the three minor Appellees, which suit was

docketed as Cause No. 1,069,341 in the Juvenile Court Number One (1) in and for Harris County, Texas and upon which a hearing was set for April 5, 1976, at 10:30 A.M.

(13) Adult Appellees caused notice of the filing of their Petition For Writ Of Habeas Corpus and of the hearing set thereon to be served upon Gene Lege, Director of Harris County Child Welfare and also issued subpoenas for attendance of witnesses.

(14) On the date and at the time scheduled for hearing on the Petition For Writ Of Habeas Corpus, Judge Lowry determined that all of the Appellees were residents of Montgomery County, Texas. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the habeas corpus proceeding, although Judge Lowry had personal knowledge, the three minor Appellees were restrained in Harris County, Texas by virtue of the terms of his own Ex Parte Order entered March 26, 1976. The case was then transferred to Montgomery County, however, the minor Appellees remained in Harris County and in the possession of Harris County Child Welfare. The second cause filed by Harris County Child Welfare was also transferred to Montgomery County.

(15) On April 5, 1976, at 4:47 P.M., Betsy C. Connor filed a second suit in Cause No. 38,295 on the docket of the Juvenile Court Number One (1) in and for Harris County, Texas, entitled Original Petition In Suit Affecting Parent-Child Relationship.

(16) Subsequent to the 4:47 P.M. filing of the Original Petition, however, on April 5, 1976, Judge Lowry entered a second Ex Parte Order continuing temporary managing

conservatorship, possession and control of three minor Appellees in Gene Lege, Director, Harris County Child Welfare.

This second Ex Parte Order setting both temporary and final hearings in the second suit show them both to be set for "the ____ day of _____, 19____ at _____ o'clock _____.m." and appoints "An attorney _____. . . . to serve as guardian ad litem and attorney at litem and represent the minor child(ren) at all hearings. . . ." On its face this same Order recites it was presented to the Court in chambers, again without notice to or hearing afforded the adult Appellees.

On May 5, 1976, at hearing before the Federal District Court, there was testimony adduced that the blanks appearing in the Order had never been filled in. The transferred cases were received and docketed (Cause No. 3,030) in Montgomery County on April 6, 1976. No hearing of any kind was ever held by the Montgomery County Court. The three children remained in the possession and control of Harris County.

On May 4, 1976, still seeking return of their children, adult Appellees filed an Application For Leave To File Writ Of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting in Houston. Such Application was denied by the Court for lack of jurisdiction on May 4, 1976.

The first hearing afforded Appellees after seizure of the three minors on March 25, 1976, was that of May 5, 1976, before Honorable John V. Singleton, Jr. who ordered return of the three minor Appellees to the adult Appellees on May 14, 1976. Nine days after the Federal District Court ordered return of the minor Appellees,

a third suit was filed by the Appellants as an Original Petition In Suit Affecting The Parent-Child Relationship (docketed as Cause No. 3,090) in the Juvenile Court of Montgomery County, Texas.

(17) The suit filed in Montgomery County on May 14, 1976, pertained only to the minor Appellee Paul Edward Sims.

On May 14, 1976, Ernest L. Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas, issued an Ex Parte Writ of Attachment for Paul Edward Sims. A hearing was set for May 21, 1976.

On May 21, 1976, counsel for Appellees made application for a Temporary Restraining Order, which was granted by the Honorable John V. Singleton, Jr.

The Three Judge Court issued a Preliminary Injunction, restraining and enjoining Appellants from filing or prosecuting any action in state Court based upon the State statutes that were unconstitutional.

(18) This three-judge Court found "irreparable harm and injury to Appellees: 1) by the very fact that in the initial proceeding initiated by the State the Appellees' family unit was disrupted for a total of forty-two (42) days without any type of relief afforded to Appellees; and 2) if the Appellants were allowed to initiate further proceedings Appellees would be placed in a similar situation as they had been prior to obtaining Federal Court relief." (Order Preliminary Injunction entered June 18, 1976).

(19) The names of all the Appellees now appear as "perpetrators" and/or victims of child abuse in a Central

Registry maintained by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (date of initial seizure of the three minor Appellees) and May 5, 1976 (the date on which minor Appellees were ordered restored to adult Appellees by this Court), although no judicial finding of any such abuse has been made.

(20) Information gathered by Harris County Child Welfare in the course of adoption of the minor Appellees Paul Edward Sims and Shawana Evette Sims by the adult Appellees in 1974 and 1975 was not retired and sealed following such adoptions. In fact and instead, such information was referred to and used by such Agency and also transmitted to the Montgomery County Agency of the Department during the time of their seizure, possession and control of the minor Appellees.

That Dorothy Mae Woods, et al. 76-H-1120 was consolidated by Court order with the Sims case on July 16, 1976. The Plaintiffs in the Woods case were Dorothy Mae Woods and her minor child Rebecca E. Woods.

That the following is a chronology of the Woods case:

(1) The Woods originally filed this cause seeking to restrain the enforcement, operation and execution of Title 2, Chapter 11, 15 and 17 of the Texas Family Code and other discriminatory and arbitrary practices on the part of the State which violated rights guaranteed by the 14th Amendment of the United States Constitution.

(2) Dorothy Mae and Rebecca E. Woods had been receiving supportative service through the State Department of Human Resources prior to January 21, 1976.

(3) On January 21, 1976, Judy Albracht, an employee (Social Worker) of the State Department picked Rebecca E. Woods up from Nursery School without notice to Dorothy Mae Woods. The social worker left only a hand written note on the door of Rebecca Wood's residence. The note was dated January 21, 1976, 4 o'clock P.M., and stated: Mrs. Woods:

> "Harris County Child Welfare has picked up your daughter, Becky, and she is now in a foster home. I need to talk to you about this—call me as soon as possible."

It was signed by Judy Albracht.

(4) On the same day, employees of the State Department of Human Resources obtained a temporary order from Criss Cole, Judge of Juvenile Court Number Three (3) in and for Harris County, Texas. The order appointed the director of Harris County Child Welfare as temporary managing conservator of Rebecca E. Woods. The order was obtained without presenting the child to a Judge and without the existence of an emergency as required by Title 2, Chapter 17, Section 17.01 of the Texas Family Code. Judge Cole set February 2, 1976, as the date for a show cause hearing to determine temporary custody pending final hearing on termination of parental rights.

(5) Dorothy Mae Woods received a telephone call from one of the Department's employees and was told the date and time of the show cause hearing. She was not served with process.

(6) The show cause hearing was held on February 2, 1976, and the Defendant was given temporary custody

and appointed temporary managing conservator of the minor child. Dorothy Mae Woods was present, however, she was not represented by counsel.

(7) The final hearing was set for April 8, 1976, however, the case was not heard until April 29, 1976.

(8) Dorothy Mae Wood's parental rights were terminated by Judge Cole on April 30, 1976; Harris County Child Welfare was appointed managing conservator and the attorney ad litem was awarded two hundred ($200.-00) dollars. Mrs. Woods was present and represented at the final hearing by Nicholas Serna, Esq., Gulf Coast Legal Foundation. The following events occurred:

May 20, 1976—A motion for a new trial was heard and denied.

May 26, 1976—Hearing, Order on Pauper's Oath signed.

May 28, 1976—Motion to Suspend the Trial Court's judgment pending appeal was denied; Ray Hardy's District Clerk's contest to Pauper's Oath overruled and Pauper's Oath sustained. An Order was signed on that date.

June 24, 1976—Finding of facts was signed.

July 2, 1976—Mrs. Woods complaint was filed with the Court (Federal District Court).

July 2, 1976—Motion to Maintain Class action and affidavit in support thereof was filed.

July 15, 1976—A transcript of the Juvenile Court's proceedings was filed with the Court of Civil Appeals First Supreme Judicial District of Texas at Houston, Texas.

July 16, 1976—Court's Order granted Mrs. Woods' attorneys to file Motion to Consolidate—Cause was consolidated with SIMS # 76-H-665 District Court of Texas at Houston, Texas.

July 21, 1976—The Statement of Facts was filed with the Court of Civil Appeals.

August 18, 1976—Mrs. Woods' et al.'s brief was filed with the Court of Civil Appeals.

October 14, 1976—Woods' Motion to Stay Proceedings in Federal Court was filed.

November 8, 1976—The above motion was granted by the Court.

(9) On December 8, 1976, the Texas Court of Civil Appeals reversed and remanded the Juvenile Court's Order which terminated the parent-child relationship (In Re: R.E.W., 545 S.L.2d 573 (C.A. 1976) opinion filed by Associate Justice Evans. The issue of the right of indigent persons to have Court appointed counsel in proceedings affecting the parent-child relationship was not dealt with by the above Court.

January 13, 1977—A Motion for Rehearing was filed by Appellee State Department et al, that motion was denied.

February 23, 1977—Woods' Petition for Writ of Error was filed with the Court of Civil Appeals.

May 11, 1977—The Texas Supreme Court refused Writs of Error, N.R.E.

May 25, 1977—The parties reached a settlement by way of a Return Home Agreement between Harris County Child Welfare and Dorothy May Woods. The agreement expired on November 30, 1977.

July 26, 1977—The Court of Civil Appeals issued its mandate. The mandate was forwarded to Ray Hardy, District Clerk, Harris County, Texas.

July 29, 1977—Rebecca E. Woods was returned to Dorothy Mae Woods.

(10) On August 17, 1977, an agreed Motion to Dismiss the cause and to receive all prior orders of the Juvenile Court terminating the parental rights of Ms. Woods, etc. was granted by the Juvenile Court.

February 27, 1978, Judgment was rendered on SIMS; the order in that cause expressly states "That this Court's consolidation of the issue of the right of indigent parents to have counsel was ill advised, but that issue shall remain pending in Civil Action Number 76-H-1120, before another Judge of this Court" (this case).

(11) The right of indigent persons to have court appointed counsel in proceedings affecting the parent-child relationship is being litigated at this point.

X

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Appellant fails to present both substantial questions and a meritorious question to be determined by this Honorable Court. Appellant fails to present specific issues to be adjudicated by this Court; further that the issues are general and not specifically stated and there is no evidence to show that fifty (50) other states have child abuse statutes similar to that of the State of Texas, in addition, that the effect of the Court's Order will

not put battered children back with their parents as the emergency provisions of Chapter 17 of the Texas Family Code provide for relief instances where children are in danger. The instant cases were not one in which the children were battered, in danger of serious harm or in danger of their lives.

The Court's order that an emergency ex parte hearing be held within a twenty-four hours period is required by the Due Process clause of the 14th Amendment of the United States Constitution, further that such hearings would not be impossible nor burdensome for the State of Texas with its conglomerate or resources, in addition, the State of Texas has instituted plans to comply with the decision of the Three Judge District Court.

An appointment of an attorney to represent the interest of the child is imperative as there are three interests to protect in suits affecting parent-child relationships. The standard of proof should be by clear and convincing evidence because of the relationship and interests involved and in order to justify the intervention of the state into the family unit. A Three Judge Court was proper in this cause pursuant to 28 U.S.C. §§ 2281, 2284, Three Judge District Court Action (1960).

XI

THAT ABSTENTION WAS NOT PROPER AND WOULD NOT HAVE BEEN WARRANTED DUE TO THE UNIQUE AND COMPELLING CIRCUMSTANCES OF THIS CASE

Appellants principally rely upon *Younger v. Harris,* 91 S.Ct. 746 (1971), in order to support their position that equitable restraint and comity required abstention,

however, the case at hand is an exception to that doctrine. This case could not have been disposed of on questions of state law. There was no conflict with the administration by a state with its own affairs. This was not an instance where there was unsettled questions of state law for the Court to resolve. Appellees had no adequate remedy at law and would have suffered great and irreparable harm if equitable jurisdiction had been denied. The statutes challenged were found to be both "flagrantly and patently violative of federal constitutional requirements." Further that several sections of the Texas Family Code were found to be unconstitutional either on their face or as applied. *Younger v. Harris* (supra); 438 F.2d 1179 (1978).

XII

THAT THERE WAS NO OPPORTUNITY FOR APPELLANTS TO FAIRLY AND PROPERLY PURSUE THEIR CONSTITUTIONAL CLAIMS IN AN ONGOING STATE PROCEEDING AND FURTHER THAT ABSTENTION WOULD HAVE BEEN IMPROPER AS THE CAUSE ON APPEAL IS AN EXCEPTION TO THE YOUNGER V. HARRIS PRINCIPLES.

This cause of action is an exception to and not barred by the anti-injunction provisions of 28 U.S.C. § 2282 (1948). The facts of the case meet the tests contained in *Younger v. Harris,* (supra), as extended to civil cases by *Huffman v. Pursue, Ltd.,* 95 S.Ct. 1200 (1975) and *Lessard v. Schmidt* (E.D. Wisc. May 28, 1976) for the granting of injunctive relief. See also *Newton v. Burgin,* 363 F. Supp. 782 (W.D. N.C. 1973).

The tests which qualify this case as an exception to the *Younger-Huffman-Lessard* doctrines are succinctly summarized by Chief Justice Burger's concurring opinion in *Allee v. Medrano,* 94 S.Ct. 2191 (1974), in which the Supreme Court affirmed a three-judge District Court of the Southern District of Texas, 347 F. Supp. 605, granting injunctive relief. Appellees quote Chief Justice Burger in *Allee v. Medrano,* (supra), at p. 2210.

> "To meet the *Younger* test the federal plaintiff must show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts. The federal plaintiff must prove both bad faith and requisite injury. In judging whether a prosecution has been commenced in bad faith, the federal court is entitled to take into consideration the full range of circumstances surrounding the prosecutions which the federal plaintiff would have the district court interfere with."

XIII

That Appellants prosecuted the suit in bad faith in that Appellees had pending against them in the Texas State Courts two suits instituted by Appellant State Department under color of Chapter 11, Title 2, Texas Family Code:

(a) Suit filed April 5, 1976, in Harris County and subsequently transferred to Montgomery County affecting all three minor Appellees and,

(b) Suit filed May 14, 1976, in Montgomery County affecting only Minor Appellee Paul

> Edward Sims. (Filed only nine days after this Court restored the minor Appellees to the adult Appellees and announced request would be made for Three-Judge Panel.)

In the light of the tests for exceptions to *Younger,* supra, as set out in *Allee v. Medrano,* (supra), Appellees rely on the following findings of this District Court:

On May 21, 1976, after Appellees brought to the attention of this Court that Appellants had filed the second suit described in (B) above, Honorable John V. Singleton, Jr. entered a Temporary Restraining Order enjoining the State action finding:

> "that Plaintiffs will suffer immediate and irreparable injury, loss and damage if Defendants . . . for which Plaintiffs have no adequate remedy at law, and further in aid of the jurisdiction of this Court, pursuant to 28 U.S.C. 2283.", *Sims v. Jimenez,* (supra).

The Order of Preliminary Injunction entered by the Panel in this case on June 18, 1976, made the following affirmative finding:

> "That the Court did find irreparable harm and injury to Plaintiffs: 1) by the very fact that in the initial proceeding initiated by the State the Plaintiffs' family unit was disrupted for a total of forty-two (42) days without any type of relief afforded to Plaintiffs; and 2) if the Defendants were allowed to initiate further proceedings Plaintiffs would be placed in a similar situation as they had been prior to obtaining Federal Court relief." *Sims v. Jimenez,* (supra).

The two suits described above were preceded by summary seizure of the minor Appellees on March 25, 1976, and by suit filed March 26, 1976, under color of Chapter 17, Title 2, Texas Family Code. In the Chapter 17 suit, Appellant State Department wholly failed to identify the parents.

In the next suit filed, Appellant State Department not only identified the parents but also blatantly recited their residence as being in another county, yet filed suit in Harris County. The Harris County Juvenile Court then placed conservatorship of the minor Appellees in Harris County, however, the litigation was transferred to Montgomery County, without notice or a hearing afforded adult Appellees.

The Harris County Juvenile Court apparently forgot about the case while the Montgomery County Juvenile Court acknowledged the case to the extent that it was assigned a case number and nothing more—no hearing was set, no process issued, nor was notice given.

The adult Appellees sought redress before the Federal District Court and secured return of the minor Appellees, the Montgomery County Unit of Child Welfare, having never seen the minor Appellee Paul Edward Sims who remained in a foster home in Harris County, filed its Chapter 11 suit referred to in (B) above, based solely on hearsay information obtained from Harris County Child Welfare Department. The information was at least 50 days old.

The Montgomery County Juvenile Court then issued an ex parte Writ Of Attachment for the Minor Appellee Paul Edward Sims.

The Federal District Court relying upon *Watson v. Buck,* 61 S.Ct. 962 (1941) found that the state statutes involved were flagrantly and patently violative of Federal Constitutional requirements, *Sims v. State Department of Public Welfare, Et Al.,* 438 F. Supp. 1188 (1977).

XIV

Extra ordinary circumstances as referred to in *Younger v. Harris* (supra) are present in this case. The Federal Court found those circumstances to be:

(a) the confusion involved in this case,

(b) the procedural irregularities, and

(c) an absence of a fair opportunity for Appellees to fairly pursue their constitutional claims in an ongoing state proceeding. *Younger v. Harris* (supra), *Trainor v. Hernandez,* 97 S.Ct. 1911 (1977); *Judice v. Vail,* 97 S.Ct. 1211 (1977) and *Gibson v. Berryhill,* 93 S.Ct. 1689 (1963).

XV

This action is multifaceted and . . . "there is no single state procedure to which Appellee's may look for relief on any other ground. The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This Court will not consider part of the scheme and abstention from another part. To do so, would seriously jeopardize any hope for an effective statutory scheme and in the name of comity and federalism, would do violence to the state functions that those principles seek to protect." *Sims v. State Department of Public Welfare* (supra) (p. 1107).

XVI

THAT THE ENJOINING OF STATE PROCEEDINGS DID NOT DISRUPT THE STATE'S PROTECTION WHICH UNDERLIES ITS CRIMINAL LAW

Appellant's reliance upon *Huffman v. Pursue, Ltd.* (supra), is not justified for the following reasons:

(a) There was no interests underlying the criminal laws of the State of Texas in this cause.

(b) extraordinary circumstances are present in this cause which justify federal injunctive relief.

(c) appellees did avail themselves of opportunity to fairly pursue their claim in state court. Judice, *supra.,* Gison, *supra,* Sims, *supra*

(d) further that Appellees would not be required to exhaust state Appellate remedies as the state proceeding was conducted in bad faith, and with an intent to harass.

(e) in addition, the statutes challenged were flagrantly and patently unconstitutional.

XVII

TRAINOR V. HERNANDEZ IS NOT APPLICABLE IN THIS CASE

Trainor v. Hernandex, supra, is not applicable to this case, presently on appeal in that the above case, an extension of, the *Younger* doctrine, addresses actions that do not warrant intervention by the Federal Courts due to absence of extraordinary circumstances; such is not the case in this instance. Further that, any pending state action was brought in bad fath and intended to harass Appellees.

XVIII

HICKS V. MIRANDA IS NOT APPLICABLE IN THIS CASE

Hicks v. Miranda, 95 S.Ct. 2281 (1975) also is not applicable to this case for the same reason discussed above regarding *Trainor v. Huffman,* (supra).

That enjoining state proceeding did not interfere with the state resolution of difficult questions of state law nor the states efforts to establish coherent policy in a matter of public concern; in that Appellees constitutional rights were paramount to any state policy.

XIX

THAT ENJOINING STATE PROCEEDINGS DID NOT INTERFERE WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW

That in this case as in *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236 (1976), federal issues are involved and the Court found in the foregoing case that jurisdiction was proper where a federal issue was involved.

XX

THAT THE ISSUES PRESENTED DO CONSTITUTE A CASE OR CONTROVERSY

Appellants rely basically upon *Flast v. Cohen,* 88 S.Ct. 1942 (1968) for their contention that a case or controversy does not exist. *Flast* holds that the dispute sought to be adjudicated must be presented in an adversary context and in a form historically viewed as capable of

judicial resolution. The disputes here are clearly presented in such a context.

XXI

The District Court in issuing an injunction found that the Appellants would suffer immediate and irreparable harm and had no adequate remedy at law.

XXII

THAT THE STATE COURT HAD THE POWER TO APPOINT AN ATTORNEY AD LITEM

The state court had the power to appoint an attorney ad litem pursuant to § 11.10(c) of the Texas Family Code which states, "The Court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the child." Appointment of an attorney ad litem is proper in suits affecting the parent-child relationship being instituted by the state as there are three interests to be protected; those interests being that of the parents, the child and the state.

That it has long been established by the United States Supreme Court that minors have interests which are separate and individual and should be given constitutional protection, *In Re: Gault,* 87 S.Ct. 1428 (1967).

XXIII

That *Rizzo v. Goode* as relied upon by Appellants is not applicable in this cause as Appellees had and have a personal stake in the outcome of the action. *Baker v. Carr,* 88 S.Ct. 1953 (1962).

XXIV

THAT APPELLEES WERE SERIOUSLY INJURED BY THE CHILD ABUSE AND NEGLECT REPORT AND INQUIRY SYSTEM (CANRIS)

That the injury suffered by Appellees was actual, as Chapter 34 of Title Two (2), Texas Family Code (1974) violates constitutional guarantees in the following manner:

(a) a court order may be obtained without notice to the parents and without showing that the relief sought is necessary.

(b) the CANRIS procedure, violates due process by permitting an unbridled invasion of the family unit, *Sims v. State Department of Public Welfare* (supra) (p. 1191).

(c) CANRIS denied individuals due process during the investigative stage of state action.

(d) the procedure constituted an invasion of privacy and

(e) the Child Abuse and Neglect Report and Inquiry System (CANRIS), the use which, purported to be a clearinghouse of child-abuse information without the protection of the right of a judicial determination constituted an infringement of rights guaranteed to Appellees by the 14th Amendment of the United States Constitution.

XXV

That Appellants both implemented and executed a policy and statutes, which violated Appellees' constitutional rights in that Appellees were denied due process

by the Court's failure to appoint an attorney ad litem for the minor children. The state's summarily seizing the minor Appellees without notice to the adult Appellees; a timely hearing after seizure of the children; bad faith implementation of the state statutes by Appellants; failure of state to provide Appellees with a full adversary hearing at the expiration of the ex parte order that was issued; Appellants unjustified intrusion upon the family unit and invasion of the privacy interests of the family.

XXVI

The Federal District Court expressly found that Appellants implemented and executed the following sections of the Texas Family Code as to violate Appellees constitutional rights:

(1) That section 11.10 is unconstitutional on its face in so far as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

(2) That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

(3) That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under

Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

(4) That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

(5) That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

(6) That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

(7) That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

(8) That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

(9) That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided

for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

(10) That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

XXVII

That the actions taken by Appellants, under color of law, against Appellees are evidence of a governmental custom and policy which seriously injured Appellees and deprived them of constitutional rights. The requirements of *Rizzo v. Goode* (supra); *Monroe v. Pape*, 81 S.Ct. 473 (1961) and *Monell v. Department of Social Services of the City of New York*, ____U.S.____, 46 L.W. 4569 (June 6, 1978). Appellees reliance upon 42 U.S.C. 1983 was justified.

XXVIII

EQUITABLE RELIEF WAS PROPER AND THE CAUSE WAS NOT MOOT AT THE TIME OF THE HEARING ON THE MERITS

Equitable relief was proper in this cause as there was both an adequate showing of responsibility and causal connection between Appellants contact and the injury alleged from the time that Appellants summarily seized the minor Appellees until relief was granted by the Dis-

trict Court in its decision of October, 1977, this cause was not moot at the time of the hearing on the merits.

XXIX

That in this case, just as the circumstances in *Roe v. Wade,* 93 S.Ct. 705 (1973), suits affecting parent-child relationship instituted by the State seeking conservatorship (custody) or termination "provides a classic justification for a conclusion of non-mootness". It could truly be "capable of repetition yet evading review," *Southern Pacific Terminal Company v. I.C.C.,* 31 S.Ct. 279, 283 (1911); *Carroll v. President and Commissioners of Princess Anne,* 89 S.Ct. 347 (1968). To say that, this cause should not have been litigated simply because the District Court returned the children during the pendency of this cause, would be one way in which the State could evade review of constitutional infringements within this area of law. The other two ways would be for the State itself to return the children or non-suit the case after persons filed suits seeking relief. In addition, the case in Montgomery County was still pending. The bad faith and harassment injury and threat of irreparable harm continued after the children were returned by the order of the Federal District Court.

XXX

The issues in this case not only involved possession of the children, but the denial of due process; unconstitutionality of the State statutes, deprivation of constitutional rights under the color of law, the integrity of the family unit, the interest of the parties and the right to privacy.

XXXI

APPELLEES RELIED UPON THE PROPER STATUTES

The statutes relied upon by Appellees were proper, as Appellants had actually under color of law and through governmental customs, implementation and execution of State statutes and policy violated Appellees' constitutional rights.

XXXII

THE STATE'S INTEREST IN THIS CASE DOES NOT JUSTIFY THE INFRINGEMENT UPON THE FUNDAMENTAL RIGHTS AND INTEREST INVOLVED HEREIN

The interest sought to be protected by the state in this instance does not warrant the infringement of Appellees' rights of family unity, due process, integrity, privacy and mutual association which are granted by the United States Constitution. Appellees acknowledge a legitimate state interest in protecting children, however, there was no compelling reason or interest that justifies the state's actions in a manner which contravenes basic constitutional principles as was done by the State in this case. The following is an overview of case law as to the constitutional interest at stake and how those interests are weighed when state intervention collides with various aspects of family law:

In *Meyer v. Nebraska,* 43 S.Ct. 625 (1923), where the Supreme Court found the right of parents to have their children study the German Language was a protected First Amendment right, stating, at p. 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. *Without doubt,* it denotes not merely freedom from bodily restraint but also . . . *the right . . . to marry, establish a home and bring up children . . .*" [Emphasis added.]

In *Pierce v. Society of Sisters,* 45 S.Ct. 571 (1925), the Court stated that the right to educate one's children as one chooses was made applicable to the States by force of the First and Fourteenth Amendments, and the Court stated:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . the child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . [and] duty to recognize and prepare him . . ."

In *Skinner v. Oklahoma,* 62 S.Ct. 1110 (1942), recognized the rights to marry and procreate as "basic civil rights of man," and struck down a state statute authorizing sterilization of habitual criminals.

In 1943, faced with a situation of State intervention as *parens patriae* involving the welfare of children in *Prince v. Massachusetts,* 63 S.Ct. 438 (1943), the Supreme Court held:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the State can neither supply or hinder

> * * * and it is the recognition of this that these decisions (*Meyer* and *Pierce*) have respected the private realm of family life which the state cannot enter." 63 S.Ct. 438 (1943).

May v. Anderson, 73 S.Ct. 840 (1953), held a parent's "immediate right to the care, custody, management and companionship of . . . minor children" to be "one of the most precious of personal liberties."

Stanley v. Illinois, 92 S.Ct. 1208 (1972), struck down an Illinois dependency and neglect statute which deprived unmarried fathers of the care and custody of their natural children upon death of their mothers, holding that the right of parents to have custody and management of their children is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Ninth Amendment.

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious than property rights.' It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." [Citation omitted.] 73 S.Ct. 840 (1953).

Roe v. Conn, ____U.S.____ (M.D. Ala., decided July 6, 1976) cites and follows *Alsager v. District Court of Polk County, Iowa,* 406 F. Supp. 10 (8th Cir. 1975),

and is the most recent decision known to Appellees dealing with the fundamental freedoms of the parent-child relationship:

> "A district court in Iowa recently reviewed the long line of Supreme Court cases addressed to the constitutional interests at stake where various aspects of family life are threatened and concluded there is a fundamental right to family integrity protected by the Fourteenth Amendment to the United States Constitution." *Alsager v. District Court of Polk County, Iowa,* (supra).
>
> A more recent Supreme Court decision, *Cleveland Board of Education v. LaFleur,* 94 S.Ct. 791 (1974), reaffirms the constitutional nature of this interest: 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' In addition to the 'liberty' concept of the Fourteenth Amendment, the Supreme Court has been equally solicitous of the family enclave under the doctrine of privacy. See *Griswold v. Connecticut,* 85 S.Ct. 1678 (1965); *Eisenstadt v. Baird,* 92 S.Ct. 1029 (1972); *Roe v. Wade,* 93 S.Ct. 705 (1973) . . .

XXXIII

DUE PROCESS REQUIRES AN EMERGENCY EX PARTE HEARING WITHIN TWENTY-FOUR HOURS AFTER TAKING POSSESSION OF A CHILD

The Federal District Court stated the following in determining when an adversary hearing should be held:

> Summary Seizure. Although the State of Texas has an interest in protecting children from abuse as quickly as possible, that interest is not sufficient to justify removal of the child without notice and an adversary hearing unless there exists an immediate threat to the safety of the child. Chapter 17 is the attempt by the Texas Legislature to deal with such an emergency. An emergency, however, does not permit the State to disregard all notions of due process. In that regard, we find the procedures of Chapter 17 to be patently and flagrantly violative of basic constitutional guarantees.
>
> Section 17.01 allows the State Department of Public Welfare to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." Such language represents a constitutionally adequate standard. After seizure, however, the "hearing" required by Section 17.02 is, in reality, no more than an ex parte presentation of a petition to a court without actual delivery of the children to the court. Although an ex parte order under these circumstances is, in itself, not constitutionally infirm, and the "hearing" may, pursuant to Section 17.03, proceed "without notice," the due process interest of the parents is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the Court.
>
> Section 17.02 currently requires that the appropriate petition be filed "immediately on delivery of the child to the court" and requires that the ex parte "hearing" be held "to provide for the temporary care or protection of the child." Two constitutional defects exhibit themselves. First, there is no requirement that the hearing itself be held "immediately." Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure. Secondly, through what this Court assumes to be

legislative oversight, the hearing is "to provide for the temporary care or protection of the child"—language which assumes that such care of protection is needed.

It is Section 17.05 and 17.06 that are fraught with constitutional defects. After the State takes emergency custody of the child and there had been a preliminary ex parte judicial determination of the propriety of the State's act, a full adversary hearing with notice should be held at the expiration of the ex parte order. Section 17.05 currently requires no such hearing at the expiration of the initial order and instead, places a clearly unconstitutional burden on the parent, via Section 17.06, to seek a modification of the order. In the event the children remain in the custody of the State pursuant to the temporary order, due process requires that in all cases a full hearing be held or that the children be returned to the custody of their parents. The fact that the parents may have been present at the initial temporary "hearing" does not relieve the State of the obligation to conduct the full adversary hearing with adequate notice to the parents. Such notice, of course, includes an adequate statement in the petition of the factual allegations upon which the State is relying to support Chapter 17 relief. Furthermore, to the extent that Section 17.05(b)(2) permits a court to "direct the filing of a suit affecting the parent-child relationship" without having first determined the need therefor in a full adversary hearing, it is an unconstitutional deprivation of due process. *Sims v. State Department of Welfare* (supra) (p. 1192 and 1193). ——

XXXIV

The Federal District Court Amended Judgment states "That Section 17.03 is unconstitutional on its face insofar

as it fails to require the state to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of the child is taken by the State." A copy of the Court's amended judgment is included herein and marked exhibit A-5 (emphasis by Appellee).

That it is clear by Appellants' own admissions and exhibits as well as a conference which was held in the chambers of the Honorable John V. Singleton, Jr., United States District Judge, in January of 1978, that an immediate hearing was deemed to mean within twenty-four hours. The following of Appellants exhibits all found in Volume I and II of Appellants' Appendix to The Jurisdictional Statement are evidence of that fact:

(1) A-52, a copy attached and marked exhibit B (emphasis added by Appellees)

(2) A-54, a copy attached and marked exhibit C (emphasis added by Appellees)

(3) A-55, a copy attached and marked exhibit D (emphasis added by Appellees)

(4) A-56, a copy attached and marked exhibit E (emphasis added by Appellees)

(5) A-57, a copy attached and marked exhibit F (emphasis added by Appellees)

(6) A-58, a copy attached and marked exhibit G (emphasis added by Appellees)

(7) A-59, a copy attached and marked exhibit H (emphasis added by Appellees)

(8) A-74, a copy attached and marked exhibit I (emphasis added by Appellees)

(9) A-81, a copy attached and marked exhibit J (emphasis added by Appellees)

(10) A-82, a copy attached and marked exhibit K (emphasis added by Appellees)

(11) A-91, a copy attached and marked exhibit L (emphasis added by Appellees)

(12) A-98, a copy attached and marked exhibit M (emphasis added by Appellees)

(13) A-107, a copy attached and marked exhibit N (emphasis added by Appellees)

(14) A-115, a copy attached and marked exhibit O (emphasis added by Appellees)

XXXV

DUE PROCESS REQUIRES THE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD BEGINNING AT THE EMERGENCY EX PARTE HEARING

Due Process does require appointment of an attorney ad litem for a child beginning at the emergency ex parte hearing. That to require the appointment of an attorney for the child within the 24 hour ex parte hearing in all suits affecting the parent-child relationship in which the State is a party, would not be impossible, nor would such an appointment be burdensome, as the child's interest is separate and distinct from that of the parents or Appellants (the State). The child's interest and rights

must be protected from the beginning of the judicial process. The prompt appointment of an attorney ad litem assures protection of these interests and rights. This Court has recognized the need for protection of rights of minors from the beginning of the judicial process. *In Re: Gault,* (supra); *Roe v. Conn.,* 417 F. Supp. 769, 780 (M.D. Ala. 1976). As stated by this Court in *Powell v. Alabama,* 53 S.Ct. 55 (1932) p. 68, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

XXXVI

CLEAR AND CONVINCING EVIDENCE IS THE PROPER STANDARD OF PROOF

The proper standard of proof in suits affecting parent-child relationship where the state is the movant should be clear and convincing evidence while such a suit is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, *In Re Winship,* 90 S.Ct. 1068 (1970), the fundamental and essential right to family integrity requires at the very least that the state notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County, Iowa,* (supra). As summarized in the earlier discussion of family integrity, the right of a familial relationship and protection of that relationship is fundamental." *Alsager v. District Court of Polk County,* (supra); *Roe v. Connecticut,* (supra); *Stanley v. Illinois,* (supra); *Prince v. Massachusetts,* (supra); *Pierce v. Society of Sisters,* (supra); *Meyer v. Nebraska,* (supra); *May v. Anderson,* (supra); *Levy v. Louisiana,* 88 S.Ct. 1509 (1968); *Gloria v. American Guaranty and Liability Insurance Co.,* 88 S.Ct. 1515.

The fundamental rights involved in termination cases and suits affecting parent-child relationships are equal to and of the same import as rights of Juveniles involved in *In Re: Gault,* (supra). The cases cited above show, that once a right has been deemed to be "fundamental," the Court then affords to the parties the utmost of due process, which would demand at least, a standard of proof consisting of clear and convincing evidence. The retention of a preponderance of the evidence as the standard of proof rather than requiring that a showing be made by clear and convincing evidence in suits to terminate or affect parental rights where the State is the Moving Party, would constitute a denial of Due Process as required by the 14th Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, Appellees pray this Honorable Court to affirm the decision of Honorable John Ingraham, Honorable John V. Singleton, Jr. and the Honorable Ross N. Sterling, SITTING AS A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISRICT OF TEXAS, HOUSTON DIVISION and to dismiss Appellants Appeal therefrom.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Motion to Affirm have on this the 29th day of September, 1978, been sent by United States Postal Service, Certified Mail, Return Receipt Requested, to the following:

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

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EXHIBIT A-1

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 76-H-665

JOHN PLEASANT SIMS, ET AL.,
Plaintiffs,

v.

RAUL JIMENEZ, ET AL.,
Defendants

Civil Action No. 76-H-1120

DOROTHY MAE WOODS, ET AL.,
Plaintiffs

v.

RAUL JIMENEZ, ET AL.,
Defendants

AMENDED JUDGMENT

Consistent with the opinion of this court entered in the above causes on October 12, 1977, it is ORDERED, ADJUDGED, and DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an

attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their discretion, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but

that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *8th* day of *March*, 1978.

_____/s/_____
JOE INGRAHAM
Senior United States
Circuit Judge

_____/s/_____
JOHN V. SINGLETON, JR.
United States District Judge

_____/s/_____
ROSS N. STERLING
United States District Judge

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requires more quantity and/or quality of evidence and requires proof to a more certain degree than the "preponderance of the evidence" standard.

TOPIC IV — ATTORNEY AD LITEM

Social Services Handbook Item 7324, (Texas Family Code, Section 11.10)

The Court found Section 11.10 of the Texas Family Code unconstitutional since it did not require an attorney ad litem to be appointed to represent the child in all suits affecting the parent-child relationship under Chapters 14, 15, and 17 of the Texas Family Code in which DHR protective services staff sought conservatorship or termination of the parent-child relationship. In these situations, the Court found the child's interest to be generally distinct from and adverse to interests of either the State (DHR) or the parents. Since these interests are separate and competing, the child deserves the constitutional protection of representation by an attorney ad litem at all such proceedings. The Sims Court stated that the court trying the suit must require the parents to pay for the child's representation, if they are able to do so.

The Court declined to rule on the parents' right to a court-appointed attorney when the parents could not afford the services of an attorney. The issue of whether indigent parents have a right to court appointed counsel is still pending in a suit before another court.

The implication for the Department of the requirement that an attorney ad litem be appointed for the child will lie primarily in drawing the court's attention to this litem. This is a difficult issue since the courts may lack funds to pay for attorneys ad litem when the parents cannot, and the attorneys ad litem must be obtained for all hearings, *including the 24-hour hearing under* Chapter 17.

The Court was careful to point out that the State's (DHR's) interest in the protection of the child is not endangered by the requirement for a hearing because of the existence of Section 34.05(d), Texas Family Code, which allows for emergency protection under Chapter 17, Texas Family Code. That is, if these examinations are required to protect a child in an emergency, the Department may take emergency custody of the child and consent to the examinations after the 24-hour hearing (see Topic VI below).

Requiring an adversary hearing before seeking psychological or psychiatric examinations of children when parents refuse to consent to them will probably have minimal implications for the Department because of the following factors:

1. The Department seldom seeks psychological or psychiatric examinations under these circumstances because they are seldom needed to protect children from death or permanent harm.
2. If the child is in a situation of immediate danger to his physical health or safety, the Department can seek managing conservatorship to obtain the right to consent to the examination. (See paragraphs on ex parte court ordered removal and emergency removal under Topic VI below). However, this will require more drastic action than the Department has formerly been required to take.

Requiring an adversary hearing before seeking physical examinations of children when parents refuse to consent to them has considerable implications for the Department in attempting to protect children. Although ex parte court-ordered physical examinations are not frequently sought during the investigation, they are always sought when the child appears to be in

danger of possible death or permanent harm and the parents refuse to allow physical examination and treatment. Under Sims, to obtain the examination, the Department must wait until an adversary hearing can be held and thus leave the child in potential danger for a period of time, or the Department must obtain conservatorship for the purpose of consenting to the examination, which involves as much or more of an intrusion into the family's privacy and parental rights than previously required by an ex parte court order for the examination.

TOPIC VI—EMERGENCY REMOVAL

Social Services Handbook Item 7330, (Texas Family Code, Section 17.01 et seq)

The Court recognized the interest of the State (DHR) in protecting children from abuse and neglect as quickly as possible. The Court approved the current language in Section 17.01, Texas Family Code, that allows DHR to take custody of a child to protect him from an immediate danger to physical health or safety. However, the Court found that Sections 17.02, 17.03, 17.05, and 17.06 violated parents' constitutional rights by not requiring that the Department:

1. Make every reasonable effort to serve notice on the parents that a hearing on the removal will be held within 24 hours after removal.
2. Hold an adversary hearing within 10 days of removal, with service of citation and notice to the parents is continued custody is sought.

Before removing a child in an emergency, the Department must consider the following courses of action in the priority of their listing. The worker and supervisor must document the reasons why a court

____n earlier on the following list is not taken before ____g one later on the list.

1. **Court-ordered removal** — Remove the child pursuant to a written court order which is based on a Chapter 14 or 15 suit filed by DHR and which is issued following an adversary hearing.
2. **Ex parte court-ordered removal** — Remove the child pursuant to a written ex parte court order, which is based on a Chapter 14 or 15 suit filed by DHR and which is issued under the authority of Section 11.11(a)(4). An adversary hearing must be scheduled within 10 days after the date of the court order and the parents served with citation and notified of the hearing. The ex parte order must be a written order; it cannot be a verbal order.
3. **Emergency removal** — Remove the child pursuant to Chapter 17 without a court order, with an ex parte hearing to be held within 24 hours after removal. An adversary hearing must be scheduled within 10 days after the date of removal and the parents served a citation and notified of the hearing. This ex parte order must be a written order; it cannot be a verbal order.

DHR defines emergency removal as removal of a child from his home or other place where he is receiving care without written parental consent and before a court order is obtained. **Emergency removal can be made only as a last resort in protecting a child. Emergency removal can be made only when all of the following factors can be documented:**

1. The child is in a situation which is of immediate danger to his physical health or safety. Immedate physical danger does not include emotional, potential, non-emergency, or non-physical abuse/neglect.

2. Ex parte court-ordered removal procedures cannot be carried out in sufficient time to protect the child from physical harm. That is, the worker has reasonable evidence, which he can verify and document, that the child would suffer physical harm between the time the worker could leave the child and the time he could return with the ex parte court order authorizing removal.
3. Available resources to protect the child in his home have been considered and found to be insufficient. Examples of these resources are emergency homemaker, protective day care, a relative or neighbor staying with the child in the home, or other similar types of resources.

If the worker and supervisor decide within the scope of the above factors that emergency removal of a child from his home is necessary, a law enforcement officer or Investigation Division staff person must accompany the worker when the child is removed from the home. If neither is available, the reason must be documented in the file and the concurrence of a social services program director must be obtained to authorize the child's removal. In addition, a protective service supervisor or another worker or DHR employee must accompany the worker when the child is actually removed. The person who accompanies the worker *should attend the 24-hour* hearing. If the worker was not accompanied by a law enforcement officer or Investigation Division staff person, the worker or supervisor must report the circumstances of the removal to the regional director for *social services within 24 hours of the removal.*

The Texas Family Code stipulates that the worker may remove a child without civil liability if the worker has reasonable cause when he removes the child to believe there was an immediate danger to the child's physical

safety (Texas Family Code, Section 17.09). The worker must verify whatever gave him "reasonable cause" to believe the child was in immediate danger and must document his verification in the case record.

All of the following steps must be taken after removing a child from his home under Chapter 17:

1. DHR must make every reasonable effort to serve notice on the parents. When the parents can be located, the worker must inform the parents orally or in writing that a hearing will *be held within 24* hours, that they have the right to obtain the services of an attorney to represent them at that hearing, and of the location of the district court where the hearing will be held. DHR must document its efforts to inform the parents and should try to verify its efforts with witnesses.
2. Immediately after removal, DHR must bring the child physically before the court. (The Sims opinion states that "immediately" *means within 24 hours of* actual removal, "barring unusual circumstances," which it did not define.) A petition must be filed at or before the time the child is delivered to the court and a hearing is held. This means that district judges, county/district/criminal district attorneys, children's attorneys ad litem, Investigation Division or law enforcement staff, and DHR workers must be available seven days a week and 365 days a year to participate in Chapter 17 emergency removal proceedings.

   Oral authorization from the judge to remove the child cannot substitute for or eliminate the need *for the 24-hour hearing required under the* Sims judgment.

   If the hearing cannot be held because the district judge or county/district/criminal district attorney

cannot attend, the worker must return the child to the home and provide whatever services are possible to protect the child from death or other permanent physical harm. In these instances, the worker must inform in writing the district judge, county/district/criminal district attorney, local law enforcement officials, the regional attorney, and the regional director for social services of the child's circumstances. The danger to the child must be clearly stated.

3. Before or at the *24-hour hearing,* DHR must file a Chapter 17 suit by and through the county/district/criminal district attorney and pursuant to Section 17.02, Texas Family Code. If evidence of the child's needs indicates possible need for continuing custody past the 10-day order, DHR should ask the county/district/criminal district attorney to join a Chapter 14 or 15 suit with the Chapter 17 suit. If the Chapter 17 suit is not filed in the county of the child's residence, a petition under Chapter 14 or 15 must be filed in the court of continuing jurisdiction. This should be done as soon as possible during the 10-day emergency order.
4. *Before or at the 24-hour hearing,* the court must appoint an attorney ad litem for the child.
5. *At the 24-hour hearing,* the court must determine whether the child is without support and is dependent on society for protection or is in immediate danger of physical injury, as set out in Section 17.04, Texas Family Code. If the court finds that the child is in either situation, the court may issue a 10-day emergency order (dating from the time of actual removal), naming the Department as temporary managing conservator. If the parents are present *at the 24-hour hearing,* they should be served while there with citation, including a copy of

provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports pending appeal would cause irreparable harm to Defendants unless the stay is granted and would cause substantial harm to the public interest by inhibiting the state's ability to gather information about and investigate suspected cases of child abuse.

3. That to apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard currently set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Defendants and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect.

4. That to require the appointment of an attorney ad litem for a child in all suits affecting the parent-child relationship in which the State is a party, especially as early as the *one-day or 24-hour ex parte* hearing, would be impossible since the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code.

5. That to require notice and hearing to parents prior to authorizing under Section 34.05(c) of Title 2 of the Texas Family Code physical examinations of children who are abused or neglected would dangerously delay treatment to children who are in need of emergency medical attention.

The grounds upon which Defendants' appeal will be based are substantially as stated above and for the reasons stated, Defendants respectfully request a stay of

substantial harm to the public interest by inhibiting the State's ability to gather information about and investigate suspected cases of child abuse. Note that the information in question is not disseminated to, or even available to, the general public or anyone else other than certain selected staff of Petitioners who are directly involved in investigating alleged abuse.

(b) To apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard of a preponderance of the evidence currently set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Petitioners and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect. Such a "higher" standard could also be used to overturn previously valid terminations, and subsequent adoptions, directly contrary to the best interests of the children involved.

(c) To require the appointment of an attorney ad litem for a child in each suit affecting the parent-child relationship in which the State is a party as early as the *one-day or 24-hour ex parte hearing would cause* irreparable harm to Petitioner. Such appointment is not only impossible as to Petitioners because the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code, it is further inappropriate since such ex parte hearing is nothing more than the equivalent of a temporary restraining order hearing.

(d) To require an emergency hearing to be held under Section 17.02 of Title 2 of the Texas Family Code within one day or 24 hours of seizure of a child in

emergency circumstances, without regard to whether the next day is a scheduled work day, would cause irreparable harm to Petitioners because to do so would always be impossible in some rural areas of the State, and frequently impossible in even urban areas of the State when a district judge was not available within 24 hours or could not hold the one-day or 24-hour hearing on the weekend.

6. Moreover, the Petitioners will be appealing the decision on the basis that the District Court should have abstained under the comity and federalism principles set out in *Younger v. Harris,* 401 U.S. 37 (1971); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Juidice v. Vail,* 97 S.Ct. 1211 (1977); and *Trainor v. Hernandez,* 97 S.Ct. 1911 (1977).

7. The abstention doctrine, as well as the Court below's massive interference with the State's judicial processes cause Petitioners to request a stay of the judgment in its entirety. However, should this Court believe a stay of the entire judgment is not appropriate, Petitioners implore the Court to stay the judgment of the District Court in so far as it holds that the Petitioners are bound to return endangered children to potentially life threatening or other physically endangering situations because a state district judge fails to hold an ex parte hearing or appoint an attorney ad litem within one day or 24 hours of seizure, regardless of the availability of such a judge or whether an ex parte *hearing is not held literally within 24 hours of the removal of the child(ren) from physically hazardous circumstances.*

WHEREFORE, Petitioners pray that the judgment of the United States District Court for the Southern District, Houston Division, or at least the certain above set forth portions of it, be stayed pending appeal and a final determination of the matter by this Court.

EXHIBIT L

District Court's holdings. However, this instant application seeks a stay only of the most egregious invasion of the operation of the state's judicial system.

While approving the statutory basis upon which the emergency seizure of a child may take place, the court below held that the initial statutorily mandated hearing was constitutionally defective in not being required to be held "immediately." In describing the due process standard it was imposing, the District Court said, "Barring unusual circumstances, . . . this ex parte presentation to a judicial authority [may not be held] beyond the very day of seizure." If there had been any doubt that this language means that the emergency hearing must be held within 24 hours of the time a child is taken into possession, the managing judge resolved it at a conference with counsel for all parties in his chambers in January 1978. After the Judgment was entered, Defendant Commissioner Jerome Chapman so advised all field staff in Executive Letter 78-5, a copy of which is attached as Exhibit E.

The reaction of state district judges, who have jurisdiction over emergency suits under Chapter 17, as well as other actions pursuant to Title 2 of the Texas Family Code, is evidenced by the letters and orders from Judges Cole, Hester, Shackleford, Moore, and Gibson, copies of which are attached as Exhibits F, G, H, I, and J, respectively. Clearly child protective service workers do not have it within their power to compel compliance with the federal district court's insistence that the emergency ex parte hearing be held within 24 hours of removal. If no state district judge is able or willing to conduct the required hearing on a weekend, keeping possession of a child subjects a worker to the risk of a suit for damages by the parents. But to return a child removed from a life-threatening or otherwise physically endangering situation would subject the worker at least to contempt proceedings by state district judges.

EXHIBIT M

"meant within 24 hours and subject to no general exceptions (such as weekends or legal holidays). Since we think the reasonable requirements regarding holding this ex parte hearing would be to have it the next scheduled workday, I would be pleased to learn that I misunderstood him.

Thus, we are appealing both the standard of proof holding and the failure to take into account the normal work week when establishing the constitutional standard for holding the equivalent of a TRO hearing (the immediate ex parte hearing under Chapter 17). As you may know we are also planning to appeal the holding regarding CANRIS and the requirement that the attorney ad litem for the child be appointed as soon as the immediate ex parte hearing (which is analogous to a TRO hearing), an aspect which is not explicitly stated in the memorandum opinion, but which Judge Singleton explained at the conference in his chambers in January.

Finally, with regard to your proposed order concerning the physical presence of the child at the immediate ex parte hearing, I do not have any disagreement. Though the memorandum opinion of the United States District Court in the subject case seems to assume physical delivery, it certainly does not mandate it. Thus, I think your proposed order represents the proper and reasonable approach.

Sincerely,

C. J. Carl
Assistant Attorney General

CJC/fd

EXHIBIT N

A-107

EXHIBIT G

March 29, 1978

Mr. Jerome Chapman
Commissioner
Texas Department of Human Resources
John Reagan Building
Austin, Texas 78711

Re: John Pleasant Sims, et
v. Raul Jimenez, et al

Dear Mr. Chapman:

I recently received from the Attorney General's Office a copy of your Executive Letter of March 1, 1978, No. 78-5, setting out procedures for the Department of Human Resources to follow in an effort to comply with the holding in *Sims*.

At that time I made a mental note of the following language:

> "Make every reasonable effort to serve notice on the parents *that a hearing on the removal will be held within twenty-four (24) hours after removal.*"

My thoughts at the time were that the underlined portion above was a matter wholly beyond the control of the DHR representative and would soon present problems. I and my brethren on the bench are rather jealous of our prerogatives as to the setting of hearings within our courts and the above language presumes that the taking of a child into custody by the DHR representative will somehow automatically convene a district court and work a setting without consulting the court.

EXHIBIT O

A-115

April 25, 1978

The Honorable Darrell Hester
District Judge
One Hundred Ninety Seventh
District Court
Brownsville, Texas 78520

Dear Judge Hester:

Thank you for your recent letter outlining your concerns regarding this department's interpretation of the holding in *Sims*. I appreciate and share your concerns.

The drafting of Executive Letter No. 78-5 was an undertaking that consumed a considerable amount of time, a great deal of review and numerous revisions. It represented the combined input of program staff, in-house counsel, and representatives of the Attorney General.

This department does not agree with all of the holdings in the *Sims* decision. We recognize and support judicial prerogative as to the setting of hearings in your court. However, I am sure you understand that it was necessary to send instructions to our staff concerning the Federal Court's judgment.

The discussion of the requirement for an ex parte hearing in the Executive letter which you referred to as the "24-hour rule", was developed with the assistance of the Attorney General's Office.